No. 365.

By. of Rose for Appts. Con'mo

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

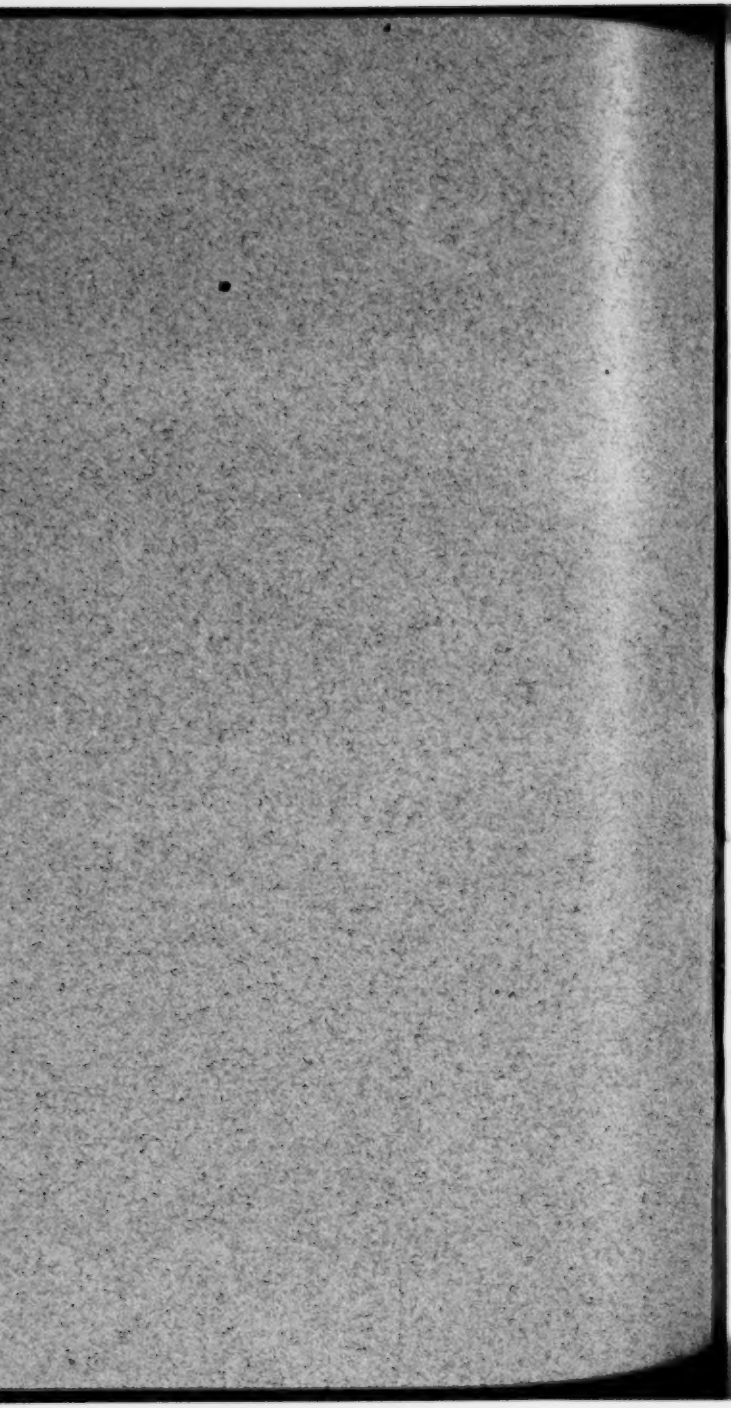
BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,

against

WILLIAM HENKEL, UNITED STATES Marshal in and for the Southern District of New York.

No. 365.

BRIEF FOR PLAINTIFFS-IN-ERROR ON MOTION TO ADVANCE.



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The Solicitor General, moving to advance this case, and have the Court assign a day for argument, bases the motion upon certain "reasons," and in stating them makes so many misstatements and errors, that unless they are corrected the Court will be under a misapprehension as to the real facts, and the defendants might seem to acquiesce by their silence.

They, therefore, briefly call attention to and correct these mistakes, or some of them.

We do not mean to assert that the learned Solicitor General has intentionally made misstatements, but assume, that as the reasons given are nearly all outside of the record, he has been obliged to rely on statements of others, and has been misled or inadvertently fallen into error.

In order that the Court may have the matter in a compact form we print the "reasons" and add to each one our remarks, changes or additions, which we print in italics.

"1. On December 8, 1899, at the Novem-
"ber term, 1899, of the United States Dis-
"trict Court for the Eastern Division of the
"Southern District of Georgia, a true bill of
"indictment was found by the Grand Jury,
"charging, in several counts, the defendants,
"Benjamin D. Greene, John F. Gaynor,
"William T. Gaynor and Edward H. Gay-
"nor and others, with conspiracy with Ober-
"lin M. Carter, late captain of the United
"States Army and engineer officer in charge
"of the Savannah engineering district, to
"defraud the United States and conspiracy
"to present false accounts, in violation of
"Sections 5440 and 5438 of the Revised
"Statutes."

THE PARAGRAPH NUMBERED ONE IS CORRECT.

"2. On December 14th, 1899, the defend-
"ants, Benjamin D. Greene, John F. Gay-
"nor, William T. Gaynor and Edward H.
"Gaynor, were arrested in the Southern
"District of New York on a warrant issued
"by John H. Shields, United States Com-
"missioner, based upon an affidavit charging
"them with having committed, in the East-
"ern Division of the Southern District of
"Georgia, the offense described in the in-
"dictment, to which affidavit a certified copy
"of the indictment was attached and re-
"ferred to."

THIS PARAGRAPH SHOULD BE CORRECTED AND CHANGED SO AS TO INCLUDE THE FOLLOWING:

The defendants, learning of the indictment be-

ing found against them, as stated in paragraph One, voluntarily appeared before Commissioner Shields, in the Southern District of New York, and gave bail for their further appearance before him for their examination on the question whether there was probable cause to believe that they were guilty of the offense alleged against them by the complaint of the Assistant District Attorney.

"3. In due course the defendants were "brought before the Commissioner for a "hearing, and the Government offered in "evidence a duly certified copy of the "indictment, together with the testimony of "witnesses, fully identifying the defendants "as being the persons so indicted and proving "they had been in the Eastern Division of "the Southern District of Georgia during the "period in which they were charged with "having committed the offense described in "the indictment. The defendants offered "no testimony to show they were not the "persons indicted, or to show they had not "been in the Eastern Division of the Southern "District at the time the offense was charged "to have been committed, but did consume "several months in offering testimony tend-"ing to disprove their guilt of the charge set "out in the indictment, all of which being "directed solely to the question of guilt or "innocence on the merits of the case was "excluded by the Commissioner as incompe-"tent."

THIS PARAGRAPH SHOULD ALSO BE AMENDED SO AS TO INCLUDE THE FOLLOWING:

On such examination the defendants vainly sought to introduce evidence to show there was no probable cause to believe that the offense had been committed, or that they were guilty of an offense.

That on the objection of the U. S. Attorney all evidence in their behalf was excluded.

"4. On February 20, 1900, the defendants
" having finally ceased to offer testimony,
" the Commissioner duly made and entered
" his order on the complaint, finding probable
" cause to believe the defendants guilty, and
" committing them to the custody of the
" marshal to await a warrant for their re-
" moval from the Southern District of New
" York to the Southern District of Georgia
" for trial. Thereupon a motion for a war-
" rant to remove them was promptly made
" before the United States District Judge,
" Hon. Addison Brown, the record of the
" proceedings before the Commissioner being
" produced and full argument had."

THIS PARAGRAPH SHOULD BE CORRECTED SO AS TO INCLUDE OR STATE THE FOLLOWING:

The Commissioner, acting solely on the certified copy of the alleged indictment, found there was probable cause to believe an offense had been committed, and the defendant should be removed to Georgia for trial on said alleged indictment. To this paragrayh also should be added that while this matter was pending before Judge Brown, in the Southern District of New York, the Federal Grand Jury, sitting in Savannah, Georgia, with the knowledge and assent of the United States Attorney (being the same officer who was prosecuting the case in New York), made a presentment to the Court which strongly censured the Commissioner for allowing the defendants to offer testimony, and severely criticised Judge Brown for delay in taking time to examine the questions raised by the defendants. That the Judge who presided at the time said alleged presentment was made was the same Judge

who presided when the alleged indictment was found, and that he not only received the presentment and ordered it on file, but stated in court that he had written to the President of the United States on the same subject, and ordered that a copy of the presentment be sent to the Congress of the United States. That this same Judge, in another Division of the Southern District of Georgia, in charging a Grand Jury, criticised the action of the New York officials, and dissented from the construction of the removal act which had then been announced by Judge Brown.

> " 5. On April 4, 1900, after having taken " time to consider, Judge Brown delivered his " opinion, holding that a valid indictment " supported by evidence identifying the de- " fendants as the persons charged in the in- " dictment and establishing the fact they " were in the district where the indictment " was found at the time when the offense " was charged to have been committed, was " not sufficient to authorize the issues of a " warrant of removal over the objection of " the defendants; that a certified copy of the " indictment was to be treated by the Com- " missioner merely as an *ex parte* affidavit, " subject to be rebutted by evidence offered " by the defense, precisely as in a case where " there is no indictment."

THIS PARAGRAPH SHOULD BE MODIFIED AND CORRECTED AS FOLLOWS:

Judge Brown held that the eight counts of this indictment purporting to charge a conspiracy and overt acts were invalid and insufficient as a pleading and as to the remaining counts, he would not pass " definitely " on them, but that as to the whole indictment, treating it as an affidavit, it was so self-

contradictory and inconsistent that it furnished no facts or evidence upon which a finding of probable cause could be based, and that the act of the Commissioner in refusing to receive the evidence offered by the defendants was error, and he refused to allow the defendants to be removed to Georgia for trial on this indictment.

"6. On June 26, 1900, in pursuance of this "opinion, Judge Brown made an order send- "ing the case back to the Commissioner "'for further competent testimony offered "by either side in accordance with the opin- "ion rendered herein.'

"On July 6, 1900, in pursuance of this "order, the hearing before the Commissioner "was recommenced. The Government was "compelled to, and did, introduce a large "number of witnesses, and offered an im- "mense amount of documentary evidence to "establish the guilt of the defendants, but "closed its case on August 13, 1900.

"The defense then consumed more than "three months in introducing its evidence, "closing on November 16, 1900.

"Two days were consumed by the Govern- "ment in rebuttal; the case upon the testi- "mony being closed November 19, 1900.

"The oral evidence before the Commis- "sioner covered some 5,000 typewitten pages, "and several trunks full of documents were in- "troduced. Voluminous briefs were printed, "oral arguments made, and the case finally "submitted to the Commissioner, who, on "February 25, 1901, a year and five days "after his first finding, made a second find- "ing of probable cause of guilt, this time "upon the entire record of evidence, and "again ordered the defendants committed to

"the custody of the marshal to await the "warrant of removal.

"At once a second motion for a warrant "was made to Judge Brown, of the United "States District bench."

THIS PARAGRAPH OF THE "REASONS" OF THE LEARNED SOLICITOR GENERAL SHOULD BE PREFACED BY THE FOLLOWING:

The learned United States Attorney, instead of acquiescing in the decision of Judge Brown, appealed to the Attorney General of the United States, and that officer prepared a bill and sent the same to the Judiciary Committees of both Houses of Congress, amending the removal section (Section 1014, U. S. R. S.), with a letter urging its passage; that the bill so presented and urged was not passed; indeed it never left one of the committees, from which fact the inference is drawn that Congress believed the law as it then stood protected the rights of the United States and the citizen, and that the construction of Judge Brown of this law was right and proper.

That these efforts on the part of the Government officials to reverse Judge Brown used up the time from April 4th to June 26th, which is now charged to these defendants as part of the great delay in this case.

"7. On May 15, 1901, Judge Brown, having "taken time to consider, delivered his opinion, "holding that not only had the Government "established probable cause to believe there "was fraud in the letting of the contracts "for river and harbor improvements by Car-"ter and the defendant contractors, but "that——

"It is shown beyond question that Captain "Carter, the employee of the Government,

"and the engineer in immediate charge of
"the work on the Government's behalf, had,
"for several years immediately preceding
"the contract referred to in the indictment,
"received from the contractors continuously,
"through his father-in-law, in many divi-
"sions of profits, one-third of the final net
"proceeds of each contract, remaining for
"division among the chief contractors, and
"that this one-third amounted in the aggre-
"gate to over $700,000.

"On May 28, 1901, in accordance with this
"opinion Judge Brown issued his warrant
"to the marshal for the removal of the de-
"fendants to Georgia for trial."

THIS PARAGRAPH SHOULD BE AMENDED SO AS TO CORRECT CERTAIN MISSTATEMENTS AND TO INCLUDE THE FOLLOWING FACTS.

Judge Brown did not hold that the Government had "established probable cause, &c.," as stated by the learned Solicitor-General, but distinctly held that he was powerless to pass on this question, as that had been passed upon by the Commissioner, and that one of the questions in this case before this Court is the correctness of such decision of Judge Brown.

Judge Brown also held and decided that the question whether there was any valid indictment because of the uncontradicted proof as to the validity of the Grand Jury that found it, was "a new "one, arising upon the construction and effect of an "important statute, and not decided or in any way "passed upon by the Supreme Court as the ultimate "authority."

As to the effect of probable cause and his action on such question, he held and decided (to quote from his opinion):

" *As respects the finding of probable cause,*
" *I have carefully considered the very ex-*
" *tended briefs and arguments of counsel,*
" *and have examined the voluminous evi-*
" *dence with a view to ascertain whether*
" *there was competent evidence before the*
" *Commissioner sufficient in itself to sustain*
" *his finding of probable cause. Under the*
" *rule above stated it is not for the Judge, on*
" *an application for removal, to compare*
" *different parts of the testimony in order to*
" *determine their relative weight, or to sub-*
" *stitute his own judgment for that of the*
" *Commissioner, even though it might on the*
" *whole evidence be different. By this, how-*
" *ever, I do not mean to be understood as*
" *expressing any opinion whatsoever on the*
" *merits of the case. The defendants have*
" *given a great deal of evidence tending to*
" *show that their contracts were fairly ob-*
" *tained, their work well and honestly done,*
" *and that the Government has not been de-*
" *frauded a dollar.*"

" 8. But they were not so removed, for
" immediately upon being taken into custody
" by the marshal they applied to the Circuit
" Court of the United States for the Southern
" District of New York for a writ of habeas
" corpus, alleging they were being illegally
" held in custody by the marshal, and at-
" tached to the application the processes and
" pleadings in the proceedings before the Com-
" missioner and before the United States Dis-
" trict Judge, and the several findings of the
" Commissioner and the findings and the
" opinions of the District Judge, together
" with only so much of the evidence as
" related to the attack made on the legality
" of the impaneling of the Grand Jury,

"the contention of the defendants being "that the indictment was void because "of irregularities in impaneling the Grand "Jury, and was, moreover, defective in "form and substance, and that there "could be no removal upon a complaint "supported by proof of guilt, if their con- "tention as to the insufficiency of the indict- "ment could be sustained. It is hardly "necessary to say that the United States "Circuit Court (Judge Lacombe) denied the "application for the writ. From this order "denying their application the defendants "made, on June 8, 1901, an appeal to this "Court."

As to this paragraph it may be said that it is a fair inference that Judge Lacombe, with the opinion of Judge Brown before him, denied the application for the writ of habeas corpus as the quickest and surest way to get the decision of this Court upon a question that was "a new one, aris- "ing upon the construction and effect of an im- "portant statute," and which has never been passed upon by this Court.

In Conclusion.

IT SEEMS HARDLY FAIR TO PUT BEFORE THIS COURT STATEMENTS AS TO THE CONVICTION AND INCARCERATION OF CARTER, AS THESE FACTS CAN HAVE NO BEARING ON THE QUESTIONS IN THIS CASE OR ON THE MOTION TO ADVANCE; MOREOVER, THE LEGALITY OF THAT CONVICTION AND IMPRISONMENT IS RAISED IN A CASE NOW ON THE CALENDAR OF THIS COURT. IT IS FURTHER SUBMITTED THAT IT IS GROSSLY UNFAIR AND IMPROPER TO CHARGE THESE DEFENDANTS WITH DELAYING THIS CASE WHEN ALL

OF THE TIME THAT HAS ELAPSED SINCE THE FINDING OF THE ALLEGED INDICTMENT HAS BEEN USED UP BY THE PROSECUTING OFFICERS IN OBTAINING INFORMATION HOW TO PROCEED IN A REMOVAL CASE OR IN CORRECTING THEIR ERRORS IN SUCH PROCEEDINGS.

THEY HAVE TRIED TO BRING ABOUT A "VIRTUAL "ABDUCTION UNDER THE FORMS OF LAW," AND BECAUSE THEY HAVE FAILED, NOW RAISE A HUE AND CRY AGAINST THE DEFENDANTS ON THE GROUND OF DELAY.

THE DEFENDANTS NOW ARE AND ALWAYS HAVE BEEN READY TO BE TRIED BEFORE ANY IMPARTIAL, UNPREJUDICED COURT ON ANY VALID LEGAL INDICTMENT, BUT THEY HAVE AND WILL OBJECT TO BEING SENT FOR TRIAL BEFORE A COURT THAT THEY BELIEVE WILL NOT GIVE THEM A FAIR TRIAL, AND BE THERE TRIED ON AN ALLEGED INDICTMENT FOUND BY POSSIBLY A PACKED, CERTAINLY A PICKED, ILLEGAL GRAND JURY.

WHILE IT DOES NOT SEEM THAT THE REASONS URGED ENTITLE THE CASE UNDER THE RULES TO BE PREFERRED OR HEARD OUT OF ITS REGULAR ORDER, THEY ARE QUITE WILLING TO HAVE THE CAUSE ADVANCED, AND DO NOT DESIRE TO BE CONSIDERED AS OPPOSING THE MOTION EXCEPT TO THE EXTENT ABOVE STATED.

IF THE COURT SHOULD BE OF OPINION THAT THE MOTION TO ADVANCE SHOULD BE GRANTED, THEY ONLY ASK THAT A DAY BE FIXED FOR HEARING WHICH WILL GIVE AMPLE TIME FOR PROPER PREPARATION.

ABRAM J. ROSE,
Of Counsel for Plaintiffs in Error.